U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: January 28, 1999

Case No.: 1996-INA-0016

In the Matter of:

FRANCESCA PURVIN,
Employer

On Behalf Of:

ANNA GOPEK,
Alien

Certifying Officer: Dolores DeHaan, Region II

Appearance: Franklin S. Abrams, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On February 9, 1994, Mrs. Francesca Purvin ("Employer") filed an application for labor certification to enable Anna Gopek ("Alien") to fill the position of Domestic Cook (AF 5-6). The job duties for the position are:

> Will cook meals for family according to taste of employer. Will prepare vegetables and meats for cooking. Will bake breads and pastries. Will prepare fancy dishes and pastries for social gatherings. Will purchase all foodstuffs. Will cook special meals for baby including pureeing of natural foods. Will clean kitchen and all kitchen equipment.

The Employer provided a rate of pay schedule as follows: $343 per week plus free room and board if live-in; $475 per week plus carfare if live-out. She also provided the following information regarding the days of work: if live-in, extra day will be Sunday from 10:30 am to 2:30 pm; will work Tuesday through Saturday if live-out.

The requirement for the position is two years of experience in the job offered or as a Houseworker, including cooking. Other Special Requirements are:

> Must be willing to stay late on occasion if parents are detained at business and cannot return home on time. Will be compensated with additional time off.

The CO issued a Notice of Findings on October 20, 1994 (AF 39-42), proposing to deny certification on the grounds that it does not appear that the job duties constitute full-time employment in the context of the Employer's household, as required by § 656.50 (recodified as § 656.3). Additionally, the CO found that the Employer's related experience requirement of two years as a houseworker to exceed the SVP requirement and, therefore, is excessive and restrictive in violation of § 656.21(b)(2).

Accordingly, the Employer was notified that it had until November 25, 1994, to rebut the findings or to cure the defects noted. On November 21, 1994, the Employer requested a three-week extension of time to file her rebuttal to the NOF. This request was granted making the rebuttal now due on or before December 16, 1994 (AF 44).

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The Employer submitted her rebuttal on November 30, 1994 (AF 45-60). She included a list of business lunches/dinners during 1993 and stated that she would like to do more of these but has been unable to because of the "lack of personnel and/or the lack of time to take away from my business activities to spend time on meal preparation." The Employer also included a daily work schedule for a cook and a weekly schedule for herself, her husband, and their son. Regarding the alternate experience requirement, the Employer contended that a person with two years of experience as a houseworker would "barely" have enough cooking experience; a person with three months of such experience would be "totally inadequate."

Counsel for the Employer submitted a response to the alternate experience requirement noted in the NOF (AF 45-56). Counsel stated:

> To my knowledge, the Labor Department has approved thousands of cases where the experience required in the 'related occupation' exceeds the SVP level of that related occupation. The reason for this is clear--the SVP level for the related occupation refers only to the amount of experience necessary to become skilled in that occupation, and has no relationship to the amount of time necessary to become prepared for the 'job offered.' (Emphasis supplied.)

Additionally, Counsel contended that, "the 'related occupation' need not make the worker fully skilled in the duties of the job offered." (Emphasis supplied.)

The CO issued a second Notice of Findings on February 27, 1995 (AF 61-63), proposing to deny certification on the grounds that the requirements for the position are restrictive and appear tailored to the Alien's background in violation of § 656.21(b)(2). Accordingly, the Employer was notified that it had until April 3, 1995, to rebut the findings or to cure the defects noted.

The Employer submitted her rebuttal on March 13, 1995, under cover letter dated March 24, 1995 (AF 64-67). She contended that a person with two years of experience as a Houseworker would have sufficient cooking experience for the offered position. Additionally, the Employer stated that she does want a person with two years of domestic experience because this person will be working in her home, would be acclimated to working in private houses, and shows the necessary attachment to domestic work for us to consider this person as a professional domestic worker. The Employer concluded that the minimum requirements are not restrictive, nor are they tailored to the Alien's background but, rather, are intended to expand the market of workers whom we would consider for this position.

Counsel for the Employer also submitted a rebuttal to the second NOF (AF 66-67). He stated that the argument in the NOF regarding the amount of experience in the related occupation is "contrary to logic, precedent, and the Dictionary of Occupational Titles itself." Counsel first contended that the SVP level of the related occupation indicates how much experience is necessary to become skilled in that occupation, not how much experience in that occupation may be required to become skilled in a higher-level occupation. Secondly, Counsel referred to *Matter of Henry L. Malloy*, 93-INA-355 (Oct. 5, 1994), in which BALCA upheld the decision in *Matter*

of Best Luggage, Inc., 88-INA-553 (November 1, 1989), which Counsel stated is entirely on point and must be followed. Thirdly, Counsel refers to the DOT's definition of SVP, and stated:

> Thus the DOT specifically and explicitly states that the SVP level of a higher grade occupation is based on the experience in a 'less responsible' job which qualifies the worker for the higher-grade job. In this case, the amount of experience, required as a houseworker, general to become qualified as a domestic cook would be set by the SVP level of the cook position, not that of the houseworker position.

The CO issued the Final Determination on June 8, 1995 (AF 68-70), denying certification because the Employer's rebuttal contradicts the minimum requirements indicated and she has not adequately documented business necessity for the related experience requirement, and remains in violation of § 656.21(b)(2). The CO noted that it appears that the position of "Cook" was created solely for the purpose of qualifying the Alien for a visa as a skilled worker, the only household occupation which falls into the skilled worker category.

On June 26, 1995, the Employer's Motion to Reconsider was received (AF 71-83), which the CO denied on June 27, 1995 (AF 84). On July 11, 1995, the Employer requested review of the Denial of Labor Certification (AF 85-86). On October 3, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On November 10, 1995, the Employer submitted a Brief. An Order was issued by BALCA on March 14, 1996, allowing the Employer 30 days to submit a statement as to whether it still wishes to pursue this appeal and, if so, to provide a current address for the Alien. On March 25, 1996, the Employer advised that she wishes to continue with this application for labor certification and provided a current address for the Alien.

Discussion

The issue presented by the appeal is whether the alternate experience requirement of two years of experience as a Houseworker is unduly restrictive under 20 C.F.R. § 656.21(b)(2).

We have considered the use of alternative experience requirements *en banc* in the matters of *Francis Kellogg, et als.*, 94-INA-465, 94-INA-544, 95-INA-68 (Feb 2, 1998) (*en banc).* In *Kellogg* we held first that any job requirements, including alternative requirements, listed by an employer on the ETA Form 750A must be read together as the employer's stated minimum requirements which, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States, shall be those defined for the job in the D.O.T.[2], and shall not include requirements for a language other than English.

[2] The job requirements listed in D.O.T. definitions are found in the definition trailer. Those requirements relate to levels of physical demands, general educational development, and specific vocational preparation.

(20 C.F.R. § 656.21(b)(2)). However, there are legitimate alternative job requirements, which can, and should be permitted in the labor certification process. But, these alternatives must be substantially equivalent to each other with respect to whether the applicant can perform in a reasonable manner the duties of the job being offered. Thus, where an employer's primary requirement is considered normal for the job in the United States and the alternative requirement is found to be substantially equivalent to that primary requirement (with respect to whether the applicant can perform in a reasonable manner the duties of the job offered), the alternative requirement must also be considered as normal for a § 656.21(b)(2) analysis.

Secondly, we held in *Kellogg* that where the alien does not meet the primary job requirements, but only potentially qualified for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. See, *Kellogg*, *supra*.

Clearly the instant case has not been considered in light of our decision in *Kellogg*, and there are no other grounds cited by the CO in the final determination. Therefore, this matter will be Remanded for reconsideration and possible re-advertisement in light of our holding in *Kellogg*.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for appropriate action.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.